RHB BANK BHD

v.

CHEW HIM FAH

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
ABDUL HAMID MOHAMAD FCJ
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-61-2000]
4 JUNE 2004

CIVIL LAW ACT: *Assignment - Failure to give notice - Whether breach of s. 4(3) Civil Law Act 1956 - Whether giving of notice not required for validity of assignment - Khaw Poh Chhuan v. Ng Gaik Peng & Ors*

CONTRACT: *Assignment - Deed of assignment - Rights, title and interest in property assigned to bank to secure loan - Whether bank had right to vacant possession of property upon default of loan - Bank's failure to make a written demand - Whether affected right to vacant possession - Whether bank had contractual rights to vacant possession*

LAND LAW: *Mortgage - Power of sale - Whether bank could exercise contractual power of sale without obtaining a court order*

The respondent herein bought a property ('the property') from Selangor Properties Berhad ('SPB'). The respondent then sold the property to one Dr Chen and assigned to him absolutely all his rights and obligations in and under his agreement with SPB with SPB's consent. Dr Chen then executed a loan agreement with the appellant herein to complete the purchase of the property. He also assigned to the appellant all his rights, title and interest in the property and under the respondent's agreement with SPB. Subsequently, Dr Chen sold the property to one, Teo and assigned to him all his rights, title and interest in the property and under the respondent's agreement with SPB. In the High Court, Teo as plaintiff commenced an action against Dr Chen, the respondent and the SPB for declarations that he was beneficially entitled to the property and for other reliefs, including an order for specific performance of the agreement he had entered with Dr Chen. The appellant, on its application, joined in as the fourth defendant and counter claimed for declarations that Teo's claim was subject to its claim. The High Court dismissed Teo's claim and made no order as to the appellant's counterclaim. Teo and the appellant then appealed to this court. Teo's appeal was dismissed but the appellant's appeal was allowed wherein the respondent was ordered to deliver vacant possession of the property

to the appellant. The respondent had since filed an appeal to the Federal Court. This was the decision as to the appellant's appeal to this court. The issues were: (1) whether the assignment by Dr Chen to the appellant was invalid as the appellant failed to give notice thereof to SPB as required by s. 4(3) of the Civil Law Act 1956 ('the Act'); (2) whether the appellant had no right to vacant possession of the property as the assignment was not absolute but was only by way of security for a loan; and (3) whether the appellant failed to comply with cl. 18 of the loan agreement and assignment with Dr Chen ('the loan agreement and assignment') for want of a written demand to the respondent as required by that clause.

Held (allowing the appeal)
Per Abdul Aziz Mohamad JCA delivering the judgment of the court:

[1] Following the Federal Court in *Khaw Poh Chhuan v. Ng Gaik Peng & Ors*, the giving of the notice mentioned in s. 4(3) of the Civil Law Act 1956 is not required for the validity of the assignment by Dr Chen to the appellant. (P 29 f-g)

[2] Clause 17(a) of the loan agreement and assignment gave the appellant the right upon Dr Chen's default to take possession of the property. (p 30 a)

[3] Clause 18 of the loan agreement and assignment was actually a covenant by Dr Chen to immediately give vacant possession on receiving a written demand and that it was applicable when the power of sale granted by cl. 17 became exercisable. The power of sale was the power under para. (c) of cl. 17. But the appellant had a specific right to take possession of the property by virtue of para. (a) of cl. 17 and that right was exercisable in any case irrespective of the exercise of the power of sale. Clause 18 was therefore not related to the exercise of the appellant's power to take possession of the property under para. (a) of cl. 17 and the notice under cl. 18 was not a requirement for the exercise of the specific right to take possession of the property under para (a) of cl. 17. (p 30 b-f)

[3a] Clause 18 applied only between the appellant and Dr Chen. Dr Chen had absconded and he did not contest Teo's suit or the appellant' counterclaim in the High Court. The respondent had assigned the property to Dr Chen but continued to occupy it. The appellant's equity prevailed over Teo's. Therefore there was nothing that ought to stand in the way of the appellant obtaining vacant possession of the property. (p 30 f-g)

[4] In view of the decision of the Federal Court in *Phileoallied Bank (Malaysia) v. Bupinder Singh & Anor*, the appellant may exercise its contractual power of sale under cl. 17(c) of the loan agreement and assignment without obtaining a court order. The essence of that decision is that contractual rights should be given effect to. (p 31 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah membeli suatu hartanah ('hartanah') dari Selangor Properties Berhad ('SPB'). Responden kemudian menjual hartanah tersebut kepada seorang Dr Chen dan, dengan persetujuan SPB, telah menyerahhak sepenuhnya hak-hak dan tanggungannya di bawah perjanjiannya dengan SPB kepada Dr Chen. Dr Chen kemudian memeterai perjanjian pinjaman dengan perayu bagi melaksanakan pembelian hartanah. Dr Chen juga telah menyerahhak segala hak, hakmilik dan kepentingannya ke atas hartanah kepada perayu, termasuk hak-hak yang terakru kepadanya di bawah perjanjian di antara responden dengan SPB. Berikutnya, Dr Chen telah menjual hartanah kepada seorang Teo dan menyerahhak kepada Teo semua hak, hakmilik dan kepentingannya ke atas hartanah dan juga hak-haknya di bawah perjanjian di antara responden dengan SPB. Di Mahkamah Tinggi, Teo, selaku plaintif, memulakan tindakan terhadap Dr Chen, responden dan SPB bagi perisytiharan bahawa beliau secara benefisialnya berhak kepada hartanah dan relif-relif lain, termasuk kepada pelaksanaan spesifik perjanjian yang dimeterainya dengan Dr Chen. Perayu, yang dinamakan sebagai defendan keempat atas permohonannya, menuntut balas bahawa tuntutan Teo adalah tertakluk kepada tuntutannya. Mahkamah Tinggi menolak tuntutan Teo dan tidak membuat sebarang perintah berkaitan tuntutan balas perayu. Teo dan perayu kemudian merayu ke mahkamah semasa. Rayuan Teo telah ditolak tetapi rayuan perayu telah dibenarkan di mana responden telah diperintahkan untuk menyerah milikan kosong hartanah kepada perayu. Responden sementara itu telah memfail rayuan ke Mahkamah Persekutuan. Keputusan di sini adalah berhubung rayuan perayu ke mahkamah ini. Isu-isunya adalah: (1) sama ada serahanhak oleh Dr Chen kepada perayu adalah tak sah kerana perayu gagal memberi notis kepada SPB seperti yang dikehendaki oleh s. 4(3) Akta Undang-Undang Sivil 1956 ('Akta'); (2) sama ada perayu tidak ada hak kepada milikan kosong hartanah kerana serahanhak tidak mutlak tetapi hanyalah suatu jaminan kepada pinjaman; dan (3) sama ada perayu gagal mematuhi fasal 18 perjanjian pinjaman dan serahanhak yang dimeterainya dengan Dr Chen ('perjanjian pinjaman dan serahanhak') atas kegagalannya membuat tuntutan bertulis kepada responden sepertimana yang dituntut oleh fasal tersebut.

Diputuskan (membenarkan rayuan)
Oleh Abdul Aziz Mohamad HMR menyampaikan penghakiman mahkamah:

[1] Mengikut Mahkamah Persekutuan dalam *Khaw Poh Chhuan lwn. Ng Gaik Peng & Ors*, pemberian notis seperti yang disebut dalam s. 4(3) Akta adalah tidak perlu bagi pengesahan serahanhak yang dibuat oleh Dr Chen kepada perayu.

[2] Fasal 17(a) perjanjian pinjaman dan serahanhak memberikan perayu hak atas kemungkiran Dr Chen untuk mengambil milikan hartanah.

[3] Fasal 18 perjanjian pinjaman dan serahanhak adalah sebenarnya waad Dr Chen untuk serta merta memberi milikan kosong sebaik menerima tuntutan bertulis dan ianya terpakai sebaik sahaja kuasa menjual seperti yang tertera dalam fasal 17 menjadi boleh dilaksana. Kuasa untuk menjual adalah kuasa di bawah perenggan (c) fasal 17. Tetapi perayu mempunyai hak spesifik untuk mengambil milikan hartanah melalui perenggan (a) fasal 17 dan haknya itu boleh dilaksana dalam apa jua keadaan tanpa mengira sama ada kuasa menjual dilaksanakan ataupun tidak. Fasal 18 dengan itu tidak berkaitan dengan kuasa perayu untuk mengambil milikan hartanah di bawah perenggan (a) fasal 17 dan notis di bawah fasal 18 juga bukan satu keperluan dalam pelaksanaan hak spesifik untuk mengambil milikan hartanah di bawah perenggan (a) fasal 17 itu.

[3a] Fasal 18 hanya terpakai kepada Dr Chen dan perayu. Dr Chen telah melarikan diri dan beliau tidak mencabar guaman Teo mahupun tuntutan balas perayu di Mahkamah Tinggi. Responden telah menyerahhak hartanah kepada Dr Chen tetapi terus menduduki hartanah. Ekuiti perayu adalah mengatasi ekuiti Teo. Oleh itu tiada apa-apa yang boleh menghalang perayu dari mendapatkan milikan hartanah.

[4] Mengambilkira keputusan Mahkamah Persekutuan dalam *Phileoallied Bank (Malaysia) v. Bupinder Singh & Anor*, perayu boleh melaksanakan hak kontraktualnya untuk menjual di bawah fasal 17(c) perjanjian pinjaman dan serahanhak tanpa perlu mendapatkan perintah mahkamah. Inti keputusan tersebut adalah bahawa hak-hak kontraktual hendaklah diberikan kesannya.

Case(s) referred to:
Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1996] 1 MLJ 761 ***(refd)***
Phileoallied Bank (Malaysia) v. Bupinder Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)

For the appellant - Wong Kian Kheong (BN Yap); M/s Lee Hishamuddin
For the respondent - Ng Mun Fai; M/s Iza Ng Yeoh & Kit

[Appeal from High Court, Kuala Lumpur; Civil Suit No: F-488-1984]

*[**Editor's note:** The respondent has applied for leave to appeal to the Federal Court vide application no: 08-107-2003 (W)]*

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad JCA:

In the High Court at Kuala Lumpur, in Civil Suit No. F-488-1984, the plaintiff ("Teo"), chiefly on the basis of an agreement dated 1 December 1997 for the sale and purchase of a certain property, in which he was the purchaser, sought against the first to the third defendants certain declarations, including a declaration that he was beneficially entitled to the property, and other reliefs, including an order for specific performance of the agreement. The appellant bank were, on their application, joined as the fourth defendant, and counterclaimed for declarations that Teo's claim was subject to their claim and that they held the right, title and interest over the property. After the bank filed their statement of defence and counterclaim, they issued a third party notice against the first defendant ("Dr. Chen"), the second defendant ("Chew") and the third defendant, Selangor Properties Berhad ("SPB"), in which they said that they claimed against Dr. Chen and Chew for a declaration that they held the legal and beneficial interest over the property "and that (Dr. Chen and Chew) deliver up vacant possession of the said property to the (bank)". The High Court dismissed Teo's claim. The learned trial judge made no order on the bank's counterclaim, in particular, according to para. (d) of the sealed order, no order for Chew to deliver up vacant possession of the property to the bank. Teo appealed to this court against the dismissal of his claim (Civil Appeal No. W-02-62-2000). The bank appealed to this court against the judge's refusal to make an order on their counterclaim (Civil Appeal No. W-02-61-2000). We heard both the appeals together. We dismissed Teo's appeal and made certain ancillary orders in respect of him. As regards the bank, in their submission before us they sought an order that Chew deliver up to them vacant possession of the property within one month. We allowed the bank's appeal and ordered Chew to deliver up vacant possession of the property to them within one month.

These grounds of judgment are prepared for the purpose of Chew's appeal to the Federal Court against our order for delivery up of vacant possession in favour of the bank. There has been no indication of an appeal by Teo against our dismissal of his appeal.

The facts that are relevant to the dispute between the bank and Chew are as follows.

By a letter-agreement dated 26 September 1972 and a supplemental agreement dated 3 September 1973, SPB sold the property to Chew. The property was known as Site No. 411 and was at No. 28, Pesiaran Bruas, Damansara Heights, Kuala Lumpur. It had no separate document of title. In January 1975 Chew started to reside at the property. He was still residing there when we heard the two appeals.

On 9 October 1975, by way of a sale and purchase agreement, Chew sold the property to Dr. Chen. On the same date, Chew, with the consent of SPB, who were a party to the deed of agreement, assigned absolutely to Dr. Chen all his rights and obligations in and under his agreements with SPB.

On 10 November 1975, the bank having agreed to lend to Dr. Chen RM95,000 to complete the purchase of the property, Dr. Chen and the bank executed a loan agreement and assignment by which Dr. Chen assigned to the bank absolutely all his rights, title and interest in and to the property and under Chew's agreements with SPB.

About two years later, on 1 December 1977, Dr. Chen sold the property to Teo, and assigned to him all his rights, title and interest in the agreements between Chew and SPB, which two years earlier he had already assigned to the bank. On 3 December 1977 Dr. Chen appointed Chew his attorney in respect of the property, in particular to collect the amount outstanding from the sale of the property. The power of attorney was revoked in 1992.

Teo in his statement of claim claimed that he had been deprived of the use and enjoyment of the property because Dr. Chen and Chew had acted jointly in collusion to frustrate the sale of the property by Dr. Chen to him and because SPB refused to consent without order of court to the assignment from Dr. Chen to him.

In the High Court, Dr. Chen did not contest Teo's suit and SPB agreed to abide by any order of the court, but Chew denied selling the property to Dr. Chen, claiming that his signatures to the sale and purchase agreement and the assignment of 9 October 1975 were a forgery. So the contest was between Teo, Chew and the bank. If Chew succeeded in proving his allegation of forgery,

then the sale and assignment by Chew to Dr. Chen was bad, Dr. Chen's assignment to the bank was bad and Dr. Chen's sale and assignment to Teo was bad, and Teo's claim and the bank's counterclaim would fail. But if there was no forgery, Chew's sale and assignment to Dr. Chen were good, and Chew had divested himself of all interest in the property, and there would remain to be decided only the position as between the claims of Teo and the bank. As to that, if Dr. Chen's assignment to the bank was absolute, Dr. Chen could not subsequently assign to Teo, so that Teo would not have acquired any interest in the property and any interest would be solely with the bank. If the assignment by Dr. Chen to the bank was not absolute, Teo would have an equity in the property by virtue of the sale and assignment to him by Dr. Chen, and the bank would have an equity in the property by virtue of the earlier assignment to them by Dr. Chen. There would be competing equities between Teo and the bank, and the question would be whose equity prevailed. If it was the bank's, they would be entitled to vacant possession of the property, and Chew, who had divested himself of all interest in the property, would have to deliver up vacant possession to the bank.

The trial judge found that Chew's signatures were not a forgery. Since Chew had not filed a notice of cross-appeal as regards that finding, we agreed with the bank that Chew accepted that finding and that, therefore, Chew had lost any claim to the property.

The consequence as regards the interests of Teo and the bank of the finding that Chew's signatures were not a forgery would, as stated earlier, be dependent on the question ("the crucial question") whether Dr. Chen's assignment to the bank was absolute or, if it was not, whether the bank's or Teo's equity prevailed, but the trial judge, holding that Dr. Chen's assignment to the bank created an equitable charge over the property in favour of the bank, but without deciding the crucial question, held that the remedy of specific performance that Teo sought was not available and dismissed Teo's suit.

As to the bank's counterclaim, which depended also on the crucial question, the judge made no order, his reason being that there was no privity of contract between Teo and the bank. We agreed with the bank that the judge erred in that reason because the bank's claim to interest in the property as against Teo was not dependent on any contract between them.

In Teo's appeal before us, since, as we found, Chew had lost all interest in the property, the question that we had to decide was the crucial question that the judge had not decided. We decided the question in favour of the bank and dismissed Teo's appeal. We did not, however, decide whether Dr. Chen's assignment to the bank was an absolute one, as we were of opinion that even

if the assignment was not an absolute assignment, the bank's equity prevailed over Teo's. The consequence was that the bank was entitled to vacant possession as against Chew, who was still in occupation of the property, and we granted the order for vacant possession that the bank sought against Chew pursuant to their counterclaim. Since these grounds are prepared only for Chew's appeal to the Federal Court, there being no indication that Teo is appealing, we need not here state our reasons for deciding that the bank's equity prevailed over Teo's.

In support of his appeal to this court, Chew raised three points, all points of law. His first point was that the assignment by Dr. Chen to the bank was not valid because notice of the assignment had not been given to SPB, as required by s. 4(3) of the Civil Law Act 1956, which, with the omission of a few lines that are not material for present purposes, provides as follows:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law … to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

Since the assignment by Dr. Chen to the bank was an assignment of his rights, title and interest in and to the property and under the agreements between Chew and SPB, SPB were the "debtor, trustee or other person" to whom the notice in writing was to be given but was not.

Following the Federal Court in *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 1 MLJ 761, we agreed with the bank's counsel that the giving of the notice mentioned in the section is not required for the validity of the assignment. In that case Peh Swee Chin FCJ, speaking for the court, said at p. 775 F-G:

> In any event, compliance with s. 4(3) is not a pre-requisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s. 4(3), eg even without notice of the assignment to such debtors, for the sake of argument, the assignment would have been valid in equity in any event against the assignor.

The second point raised by Chew was that the assignment was not an absolute assignment but was only by way of security for a loan. We understood Chew to mean that for that reason the bank had no right to possession. It was clear to us that cl. 17(a) of the loan agreement and assignment gave the bank the right, upon default by Dr. Chen, to take possession of the property.

Chew's third point was that the bank had not complied with the requirement of cl. 18 of the loan agreement and assignment, because the bank had not made a written demand as required by that clause. Clause 18 provided as follows:

> 18. When the power of sale granted by Clause 17 hereof becomes exercisable by the Bank the Borrower hereby declares and agrees that he will give vacant possession of the said land to the Bank or any persons authorized by the Bank immediately on receiving written demand in that behalf from the Bank.

Clause 17 gave the bank certain rights and powers upon default by Dr. Chen, the borrower. Paragraph (a) gave the right to take possession of the property. Paragraph (b) gave the right to let, lease or demise the property. Paragraph (c) gave the right and power to sell and assign the property.

We were of the view that cl. 18 was actually a covenant by Dr. Chen to immediately give vacant possession on receiving a written demand and that it was applicable when the power of sale granted by cl. 17 became exercisable. The power of sale was the power under para. (c) of the clause. But the bank had a specific right to take possession given by para. (a) and that right was exercisable in any case irrespective of the exercise of the power of sale. Clause 18 was therefore not related to the exercise of the bank's power to take possession under para. (a) of cl. 17 and the notice under cl. 18 was not a requirement for the exercise of the specific right to take possession under para. (a) of cl. 17.

In any case cl. 18 applied only between the bank and Dr. Chen. Dr. Chen, we were informed, had absconded and he did not contest Teo's suit or the bank's counterclaim. Chew had assigned the property to Dr. Chen but continued to occupy it. The bank's equity we found prevailed over Teo's. So there was nothing that ought to stand in the way of the bank's obtaining vacant possession from Chew. We therefore gave the order for vacant possession in the bank's favour against Chew. We ordered Chew to pay the bank's costs of the appeal and costs in the High Court.

There is one thing that we wish to add. According to para. (b) of the sealed order in the High Court, it was ordered that the bank ought to apply to the court to sell the property. We do not find such an order in the trial judge's grounds of judgment or in the notes of proceedings in the High Court. In the appeal, the bank submitted that that order was wrong in view of the Federal Court's decision in *Phileoallied Bank (Malaysia) v. Bupinder Singh & Anor* [2002] 2 CLJ 621, at p. 640i-641a, as follows:

> All things considered, we were more inclined to agree with learned counsel for the appellant in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to the land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

We did not decide the point when we decided the appeal. We wish now to state that in our opinion, in view of that decision of the Federal Court, the bank may exercise their contractual power of sale under para. (c) of cl. 17 without obtaining a court order. Although the passage speaks of an absolute assignment, and, as we have stated, we did not decide whether Dr. Chen's assignment in this case was an absolute assignment, we think that the essence of the decision is that contractual rights should be given effect to.